2021 WL 5930401 (Ariz.App. Div. 1) (Appellate Brief)
Court of Appeals of Arizona, Division 1.

SAN CARLOS APACHE TRIBE, Appellants,

v.

State of Arizona; Arizona Water Quality Appeals Board;
Department of Environmental Quality, Appellees;
Resolution Copper Mining, LLC Intervenor/Appellee.

No. 1 CA-CV 21-0295.
October 18, 2021.

Maricopa County Superior Court No. LC2019-000264-001

Answering Brief

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*1 INTRODUCTION

This case involves a challenge to a permit that the Arizona Department of Environmental Quality ("ADEQ") issued that imposed limits and conditions on an Arizona mine's discharge of pollutants into Queen Creek. Under federal and Arizona law, permits issued to new sources of pollution impose limits and conditions that are generally more stringent than permits issued to existing sources of pollution impose. The ADEQ issued the permit in question after determining that the mine was an existing source of pollution. The permit challengers contended that it erred in doing so because the new features that the mine had added made it a new source of pollution under 40 C.F.R. §§ 122.2 and 122.29(b). The Water Quality Appeals Board upheld ADEQ's determination that the mine was not a new source of pollution under those provisions. Because the superior court's decision correctly upheld the Board's decision, this Court should affirm it.

STATEMENT OF THE CASE[1]

This matter arises from an appeal of the Maricopa County Superior Court's review of the Water Quality Appeals Board ("Board" or "WQAB")'s June 25, 2019, Final Administrative Decision (Electronic Index of Record ["IOR"] 467 at 101-58) in which the Board affirmed the Arizona Department of Environmental Quality ("ADEQ")'s decision to renew ***2** AzPDES permit No. AZ0020389 ("Permit") (IOR 276) issued to Resolution Copper Mining LLC ("Resolution Copper" or "RCM") on January 19, 2017.[2] As part of its administrative process, the Board referred the matter to the Office of Administrative Hearings ("OAH"), which conducted a seven-day evidentiary hearing. In due course, the Administrative Law Judge ("ALJ") submitted his recommended decision to the Board for further proceedings. (IOR 440.)

The Board received the ALJ's recommended decision and held yet another hearing at which the parties argued various motions before it (IOR 465 at 61-62, 87-88), after which the Board adopted the ALJ's recommendation (IOR 440 at 44) to remand the matter for ADEQ to conduct a New Source Analysis pursuant to 40 C.F.R. § 122.29(b) and to submit its analysis to the Board for further consideration (IOR 465 at 90-93).

However, this presented a difficulty in that the ALJ made certain Findings of Fact[3] and Conclusions of Law[4] that if binding on ADEQ would not have permitted ADEQ to perform an independent new source analysis under § 122.29(b) in the first instance, something that the ALJ recognized had not yet been done and that he ***3** therefore "had no authority to address." (IOR 440 at 39.)[5] If the ALJ's initial findings and conclusions had been binding on remand, ADEQ would not have been able to conduct an independent new source analysis under § 122.29(b) and would have simply had to rubber stamp the ALJ's determinations. This would have defeated the remand's entire purpose.

Ultimately, the Board decided to allow ADEQ the flexibility to disregard those Findings of Fact and Conclusions of Law that would impermissibly bind ADEQ's ability to perform an independent new source analysis on remand. (IOR 465 at 90-91.) The ADEQ provided its analysis to the Board on February 15, 2019. (IOR 466 at 12-27.) The analysis not only contained a description of the process that ADEQ had employed in conducting it, but also contained a detailed review of the terms that 40 C.F.R. § 122.29(b) used as well as of the terms that 40 C.F.R. § 122.2 used, a table parsing how ADEQ had interpreted those regulations and the facts, and finally, a flow chart illustrating the decision process. (IOR 466 at 12-27.)

Ultimately, the Board issued its Final Administrative Decision upholding the Permit on June 25, 2019. (IOR 467 at 102-07.) The Appellant, the San Carlos ***4** Apache Tribe (the "Tribe"), timely appealed the Board's decision to the superior court. (IOR 468 at 3-9; IOR 602.) The superior court upheld the Board's decision in a signed minute entry order that included an Arizona Rule of Civil Procedure 54(c) finality certification. (IOR 602 at 12.) The Tribe timely appealed that decision to this Court. (IOR 605.) This Court has jurisdiction under A.R.S. § 12-913.

STATEMENT OF FACTS

1. The AzPDES[6] Permit's Scope.

The Arizona Pollution Discharge Elimination System ("AzPDES") permit ("Permit")[7] regulates discharges of pollutants from point sources[8] to waters of the United States. A.R.S. § 49-255(2); 33 U.S.C. § 1311(a); A.R.S. § 49-255.01(A); *see also* IOR 442 at 26.[9] To protect the receiving water quality, the AzPDES ***5** Permit regulates the quality of the effluent at the point of discharge, not the quality of the source water before discharge. (IOR 442 at 28; IOR 443 at 54, 55, 109.) The Permit places limits and conditions on the discharge from the Mine as the source of those discharges. (IOR 442 at 27; IOR 443 at 109.) The Permit does not restrict the boundaries of the real property from which source water originates, restrict who owns that real property, or restrict how the owners use that property. (IOR 443 at 23, 107.) The Arizona AzPDES Permit, like the federal Environmental Protection Agency ("EPA")-issued NPDES Permit, controls the *discharge* of pollutants to protect the quality of the receiving water. *See* 33 U.S.C. § 1342; A.R.S. § 49-255.01(A). Therefore, as long as the water discharged from the Mine meets the conditions set forth in the Permit, the receiving water will be protected. (IOR 443 at 53, 154.)

In determining the appropriate water-quality-based effluent limitations for Resolution Copper's AzPDES permit, ADEQ used the EPA's NPDES Permit Writer's Manual (IOR 158) and the EPA's Technical Support Document for Water Quality Toxics (IOR 159) to develop the water-quality-based effluent limitations in the Permit. (IOR 442 at 173.) The EPA's Technical Support

Document clearly states as follows: "Water quality-based limits developed in accordance with the EPA Technical Support Document prevent the violation of water quality standards." (IOR 159 at 20; IOR 448 at 149.)

***6 2. Background Facts.**

The RCM mine ("the Mine") is the latest development of an underground copper mine that has been operating near Superior, Arizona, for over a century. (IOR 276 at 4; IOR 442 at 56, 59; IOR 443 at 74, 92, 93, 124, 139, 159.) The Mine and its components have always consisted of a combination of underground workings, such as shafts, tunnels, and the equipment necessary to exploit underground ore bodies. (*See* IOR 253 at 6.) Like most copper mining companies, the Mine's original owner, Magma Copper Company ("Magma"), operated the Mine continuously (with activity levels varying with copper market prices) until 1996. (*See, e.g.,* IOR 253.)

At that time, the Mine ceased extraction activities but continued other activities relating to mining. (*Id.* at 12.) While the Mine's historic operations used a combination of shafts and tunnels, because of the Resolution ore deposit's size, the Mine will now instead use a panel mining technique, which is a type of block cave mining method. (IOR 443 at 173-175; IOR 445 at 35-36; IOR 447 at 33-35; IOR 448 at 70, 90-91.)

Over the course of the Mine's more than 100-year existence, ore mining operations in pursuit of marketable copper ore expanded in a generally eastward direction from the Mine's original location. (IOR 253 at 6-12; IOR 443 at 74; IOR 448 at 42, 59-60, 91.) As a result of exploration in the 1990s, RCM's predecessor ***7** Magma discovered a new copper ore body, but it did not exploit that new body. (IOR 253 at 12-13; IOR 448 at 60.) This new ore body is located on the eastern side of the historic Mine workings, directly in the path of the Mine's historical expansion.[10] (IOR 411 at 52; IOR 443 at 176.) This ore body was named the Resolution Ore Body after Resolution Copper acquired the Mine. (IOR 253 at 12; IOR 448 at 60.)

Starting in 1995, the EPA has repeatedly and continuously permitted the Mine to discharge its drainage under the Clean Water Act ("CWA") National Pollutant Discharge Elimination System ("NPDES") program, and the ADEQ continued to renew these permits under its delegated AzPDES program. (IOR 442 at 33, 106; IOR 443 at 101, 102.) Thus, the first Permit was issued to the Mine in 1975. (IOR 213.) The ADEQ signed the current Permit in 2017. (IOR 276; IOR 442 at 202.)

After an "earn-in" period,[11] RCM took over control of the Mine in 2004. (IOR 440 at 5; IOR 448 at 60, 68, 74.) After Resolution Copper acquired the ***8** Mine, it added various features to its operation that were consistent with its development of the new ore body. (IOR 253 at 12-13.) Before it purchased the Mine, the underground workings were filled with groundwater that had seeped into them. (*Id.* at 10; IOR 446 at 58.) It needed to pump out that groundwater (IOR 253 at 10) to access the new Resolution ore body. It also needed to sink a new shaft. (*Id.* at 13.) This shaft is referred to as Shaft 10, and it is over 8700 feet deep. (IOR 442 at 143.)

In addition to the new Shaft 10, Resolution Copper installed a new mine water treatment plant ("MWTP") to treat the mine drainage in conformance with its Permit's conditions. (IOR 157 at 2; IOR 442 at 46.) It also installed other features to the Mine to facilitate the extraction of copper ore. These features included such things as mine shafts and other underground workings, cooling blowdown towers, a truck wash pad, and various rock stockpiles. (IOR 446 at 67, 70.) Mine drainage from all of these features passes through the Mine, and the MWTP treats it to the standards that the Permit requires before any water can be discharged into Queen Creek. (IOR 446 at 69-70; IOR 448 at 170.) The Mine, however, has never discharged effluent (treated or otherwise) into Queen Creek. (Id.)[12]

***9 3. Facts to Clarify the Record.**

The ADEQ offers the following facts to clarify the record.

The Tribe's first issue presented for review misstates the record. It provides in part as follows: "Was the WQAB's *order to ADEQ to reject* certain of the ALJ's Findings of Fact and Conclusions of Law ...." (OB at 13 *[emphasis added]*.) The Board's interim order *permitted ADEQ the freedom* to disregard certain Findings of Fact and Conclusions of Law when conducting the new source analysis that the Board had ordered. (IOR 465 at 91.) Contrary to what the Tribe repeatedly claims in its Opening Brief ("OB") (OB at 10, 13, 17, 26), the Board did not "direct" or "order" ADEQ to ignore the ALJ's Findings and Conclusions, but simply permitted it to do so. (IOR 465 at 91.)

There are only three facts that bear on whether the Mine's new features are new sources. These are as follows: (1) the year that the mine originally commenced operations, which was 1911 (IOR 253 at 6-7), (2) the year that the Mine received its initial NPDES Permit, which was 1975 (IOR 213),[13] and (3) the year that New Source Performance Standards were promulgated in Section 306 of the Clean Water Act, which was 1982 (*see* IOR 466 at 20). None of these facts are ***10** contested.

The Tribe begins its Opening Brief by incorrectly stating that "Resolution was a *new* discharger and, as a matter of law, should never have been authorized to discharge pollutants into Queen Creek." (OB at 5-6.) A new discharger is a term of art that 40 C.F.R. § 122.2 defines. It is distinct from a new source, and a new discharger would *not* be categorically barred from discharging into Queen Creek.[14]

The ALJ addressed the new discharger issue in Finding of Fact number 23 of his Decision, in which he stated that "each Appellant also contended that RCM is a new discharger, but during the proceedings, each withdrew that allegation. Although the Tribe reasserted this allegation in its closing argument, it presented no substantial evidence on the issue." (IOR 440 at 5.) The Tribe failed to appeal this issue to the superior court, and it therefore cannot raise it now.

Contrary to the Tribe's assertion that the Magma Copper Mine "permanently ceased active mining in 1996" (OB at 9), "work or other activity related to the extraction, removal, or recovery of metal ore" was continuously being conducted during this time period, thereby satisfying the "active mining area" definition under 40 C.F.R. § 440.132(a).[15] Additionally, Magma discovered the Resolution ***11** ore body in the mid-1990s, nine years before Resolution Copper acquired Magma. (IOR 253 at 12.) Between 1996 and the construction of Shaft 10, Magma continued exploration. (*Id.* at 11-12.) After acquiring the Mine, Resolution Copper continued that exploration, completing two additional underground drill holes, sixteen deep exploration drillings, and seventy-six core holes. (*Id.* at 12-13.) In addition, when the Magma Mine closed, it had completed a $54 million upgrade to the San Manuel smelter.[16] (IOR 194 at 13.)

Finally, Magma started its NPDES permit renewal process on May 4, 1998, roughly two years *after* the date that the Tribe claims Magma "permanently ceased mining operations." (IOR 229.) There is no reason why Magma Mine would have renewed its NPDES Permit if it were permanently abandoning the Mine. It is also obvious that obtaining permit coverage for mining activities is an activity related to the extraction of ore, which is an active mining area's purpose that 40 C.F.R. § 440.1329(a) addresses.

ISSUES PRESENTED FOR REVIEW

1. Should this Court decline to consider the Tribe's challenge to the Board's interim remand order because the superior court correctly determined that *12 it lacked jurisdiction to review the order and did not abuse its discretion by alternatively determining that the permit challengers had waived any objection to the order?

2. Alternatively, does the Tribe's challenge to the Board's interim remand order fail on the merits because the Board was not required to include any written justifications in the order given that it was not the Board's final decision and that the Board did not reject or modify any of the ALJ's findings of fact or conclusions of law in it?

3. Did the superior court correctly affirm the Board's decision upholding ADEQ's determination that the mine's new features were not new sources of pollutants under 40 C.F.R. §§ 122.2 and 122.29(b)?

4. Did the superior court properly consider ADEQ's interpretation of the new source regulations in reviewing the Board's final decision, and did the Board's order permitting ADEQ to disregard the ALJ's findings of fact in making its new source analysis on remand render the analysis incomplete or otherwise deficient?

5. Has the Tribe incorrectly cited A.R.S. § 12-2030 in support of its attorney's fees request because that statute applies only with respect to a duty imposed by law that is so clear that it amounts to a ministerial duty?

*13 ARGUMENTS

I. This Court Should Decline to Consider the Tribe's Challenge to the Board's Interim Remand Order Because the Superior Court Correctly Determined that It Lacked Jurisdiction to Review the Order and Did Not Abuse Its Discretion by Alternatively Determining that the Permit Challengers Had Waived Any Objection to the Order.

A. Standard of Review.

This Court reviews jurisdictional issues de novo, *Murphy v. Bd. of Med. Exam'rs,* 190 Ariz. 441, 446 n.8 (1987), and reviews the superior court's determination that an issue has been waived for an abuse of discretion, *see Powers v. Guar. RV, Inc.,* 229 Ariz. 555, 562, ¶ 24 (App. 2012).

B. The Superior Court Correctly Determined that It Lacked Jurisdiction to Review the Board's Interim Remand Order, and This Court Therefore Also Lacks Jurisdiction to Review it.

The Tribe contends that the Board's November 11, 2018, order remanding the matter to ADEQ to conduct a new source analysis under 40 C.F.R. § 122.29(b) (IOR 441 at 56-59) was arbitrary, capricious, and contrary to law because it permitted ADEQ in conducting that analysis to disregard the findings of fact and conclusions of law that the ALJ had made concerning the new source issue. (OB at 17-19.) The superior court correctly determined that it did not have jurisdiction to review the Board's interim remand order. (IOR 602 at 9-10.)

The ALJ submitted his recommended decision to the Board on October 15, 2018. (IOR 440.) In that order, the ALJ recommended that ADEQ perform a new source analysis pursuant to 40 C.F.R. § 122.29(b). (*Id.* at 44.) The Board then *14 scheduled a hearing to consider the ALJ's decision. (IOR 465 at 61.) There, ADEQ argued that for it to perform such an analysis, it had to be free to disregard certain Findings of Fact and Conclusions of Law. (*Id.*) The Board agreed, adopted the ALJ's recommendation to remand the issue to ADEQ with instructions to "begin work on the new source analysis as soon as practicable" and to "submit the written analysis and necessary supporting information to the Board." (*Id.* at 90-91.) This order was not a final administrative decision.

A court's subject-matter jurisdiction is its power "to hear and determine a general class of cases to which a particular proceeding belongs." *Grosvenor Holdings, L.C. v. Figueroa,* 222 Ariz. 588, 595, ¶ 13 (App. 2009) (internal quotation marks omitted). The

superior court's jurisdiction is conferred by Arizona's Constitution and statutes. *Id.* The right to appeal from an administrative decision exists only by statute and is limited by the statute's terms. *Ariz. Physicians IPA, Inc. v. W. Ariz. Reg'l Med. Ctr.*, 228 Ariz. 112, 114, ¶ 10 (App. 2011). Only the Board's final decisions are subject to appeal under the Judicial Review of Administrative Decisions Act (JRADA) (formerly called the Administrative Review Act), A.R.S. §§ 12-901 to -914. A.R.S. § 49-323(B) (stating that the Board's final decisions are appealable to the superior court pursuant to JRADA); *see also* A.R.S. §§ 12-901(2) (stating that for purposes of JRADA, an administrative decision is one that "terminates the proceeding before ***15** the administrative agency"); - 902(A)(1) (stating that JRADA applies to actions to judicially review an administrative agency's final decision); -905(A) ("Jurisdiction to review final administrative decisions is vested in the superior court."). A remand order is not a final agency decision. *Ariz. Physicians*, 228 Ariz. at 114, ¶ 11; *see also City of Tucson v. Mills*, 114 Ariz. 107, 110 (App. 1976) (stating that a decision [or an order] remanding a matter to an agency for further proceedings "does not dismiss or terminate the administrative proceeding" but instead allows the agency to "take a fresh look at the matter involved"). The superior court therefore correctly determined that it did not have jurisdiction to review the Board's interim remand order. (IOR 602 at 9-10.)

Because appellate jurisdiction is derivative, if the superior court lacks jurisdiction to consider a particular decision, this Court also lacks jurisdiction to consider it on appeal. *Webb v. Charles*, 125 Ariz. 558, 565 (App. 1980); *Riley v. County of Cochise*, 10 Ariz. App. 55, 57 (1969). This Court therefore lacks jurisdiction to consider the Tribe's claim concerning the remand order just as the superior court did.

C. The Superior Court Did Not Abuse Its Discretion by Alternatively Determining that the Permit Challengers Had Waived Any Objection to the Remand Order.

If this Court determines that it does have jurisdiction to consider the Tribe's challenge to the Board's remand order, it should nevertheless decline to consider it ***16** because the superior court did not abuse its discretion in alternatively declining to consider the permit challengers' objection to the order on the ground that they had waived it. (IOR 602 at 10.) The superior court noted that the Board had issued its remand order on November 19, 2018, and that ADEQ had submitted its new source analysis following the remand on February 15, 2019. (*Id.*) The court further noted that it was not until March 8, 2019-109 days after the remand order was issued-that the permit challengers, including the Tribe, had first objected to the procedure of allowing ADEQ to disregard the ALJ's findings of fact and conclusions of law concerning the new source issue while conducting its new source analysis on remand. (*Id.*) This delay was clearly outside the thirty-day window provided for in A.A.C. R2-17-125(A). The court stated that if the permit challengers believed that the remand order was improper, they should have objected to it in a reasonable time after it was issued instead of waiting to see whether ADEQ's new source analysis on remand would benefit them in some way. (*Id.*) The court therefore declined to consider their challenge to the order on the ground of waiver as well as on the ground of lack of jurisdiction. (*Id.*)

An action to review an administrative decision under JRADA is an action "in the nature of an appeal." *Knape v. Brown*, 86 Ariz. 158, 159 (1959). Arguments that are not timely presented below are generally considered to be waived on appeal. *See* ***17** *Union Rock & Materials Corp. v. Scottsdale Conf. Ctr.*, 139 Ariz. 268, 273 (App. 1983). The superior court therefore did not abuse its discretion in determining that the permit challengers, including the Tribe, had waived their objection to the remand order, and this Court should find that the Tribe has waived its challenge to the order for purposes of this appeal as well. *Caldwell v. Pima County*, 172 Ariz. 352, 354 (App. 1991) ("[T]he failure to timely raise an issue before an administrative tribunal generally waives the issue on review ....").

II. Alternatively, the Tribe's Challenge to the Board's Interim Remand Order Fails on the Merits Because the Board Was Not Required to Include Any Written Justifications in the Order Given that It Was Not the Board's Final Decision and that the Board Did Not Reject or Modify Any of the ALJ's Findings of Fact or Conclusions of Law in It.

A. Standard of Review.

The interpretation of a statute or a regulation is a legal question, and this Court therefore considers the interpretation of a statute or regulation and its application to the facts de novo. *Patterson v. Maricopa Cty. Sheriff's Off.*, 177 Ariz. 153, 156 (App. 1993).

B. The Board Was Not Required to Include Any Written Justifications in the Interim Remand Order.

If this Court finds that it has jurisdiction to consider the Tribe's challenge to the remand order and that the Tribe did not waive its challenge by failing to timely ***18** raise it before the Board, it should reject the Tribe's challenge on its merits. The Tribe argues that by permitting ADEQ to disregard the ALJ's findings of fact and conclusions of law concerning the new source issue, the Board "essentially modified [the ALJ's] decision and rejected those findings and conclusions" without providing the written justification for doing so that A.A.C. R2-17-124(B) (now A.A.C. R2-17-124(A)(2)) and its statutory counterpart A.R.S. § 41-1092.08(B) require. (OB at 18.) The Tribe is wrong because those provisions apply only to the Board's final decisions. *See* A.A.C. R2-17-124(A)(2) (stating that the decision that must contain written justifications for rejecting or modifying the ALJ's decision is the Board's final administrative decision); A.R.S. § 41-1092.08(F) (essentially stating that where a board reviews an ALJ's decision under A.R.S. § 41-1092.08(B), the board's decision is the final agency decision). Because the Board's interim remand order in this case was not a final agency *decision, Ariz. Physicians*, 228 Ariz. at 114, ¶ 11, the Board was not required to include any written justifications in it.

Moreover, the Board did not reject or modify any of the ALJ's findings of fact or conclusions of law concerning the new source issue in its order permitting ADEQ to disregard those findings and conclusions on remand. (*See* IOR 441 at 4.) It instead subsequently adopted all the findings of fact concerning the new source issue in its final decision. (*Id.*) It also provided written justifications in its ***19** final decision for the conclusions of law concerning the new source issue that it rejected or found to be inapplicable. (*Id.* at 3-4.) The record therefore contains no support for the Tribe's assertion that the Board violated A.A.C. R2-17-124(B) (now A.A.C. R2-17-124(A)(2)) and A.R.S. § 41-1092.08(B), and this Court should reject it.

III. The Superior Court Correctly Affirmed the Board's Decision Upholding ADEQ's Determination that the Mine's New Features Were Not New Sources of Pollutants Under 40 C.F.R. §§ 122.2 and 122.29(b).

A. Standard of Review.

The interpretation of a statute or a regulation is a legal question, and this Court therefore considers the interpretation of a statute or regulation and its application to the facts de novo. *Patterson v. Maricopa Cty. Sheriff's Off.*, 177 Ariz. 153, 156 (App. 1993).

With respect to factual findings, when this Court reviews a superior court's ruling on an agency's final administrative decision, it first must determine whether the record contains evidence to support that judgment. *Siler v. Ariz. Dep't of Real Est.*, 193 Ariz. 374, 378, ¶ 14 (App. 1998). "[I]f an agency's decision is supported by the record, substantial evidence exists to support the decision even if the record also supports a different conclusion." *JHass Grp. L.L.C. v. Ariz. Dep't of Fin. Insts.*, 238 Ariz. 377, 387, ¶ 37 (App. 2015). Thus, "If two inconsistent factual conclusions could be supported by the record, then there is substantial evidence to ***20** support an administrative decision that elects either conclusion." *DeGroot v. Ariz. Racing Comm'n*, 141 Ariz. 331, 336 (App. 1984); *Webster v. State Bd. of Regents*, 123 Ariz. 363, 365-66 (App. 1979); *see also Waltz Healing Ctr, Inc. v. Ariz. Dep't of Health Servs.*, 245 Ariz. 610, 613, ¶ 9 (App. 2018) (stating that appellate courts "defer to [an] agency's factual findings if they are supported by substantial evidence, even if other evidence before the agency would support a different conclusion"). This Court "will not disturb an agency's factual findings that the evidence substantially supports." *JH2K I LLC v. Ariz. Dep't of Health Servs.*, 246 Ariz. 307, 310, ¶ 8 (App. 2019). "Only where the administrative decision is unsupported by competent evidence may [a] court set it aside as being arbitrary and capricious." *City of Tucson v. Mills*, 114 Ariz. 107, 111 (App. 1976). Neither the superior court nor this Court "may substitute its judgment for that of the agency on factual questions." *JHass Grp.*, 238 Ariz. at 383, ¶ 20.

B. The ADEQ's New Source Analysis Under 40 C.F.R. § 122.2.

The Tribe contends that the Board erred in upholding ADEQ's determination that the Mine's new features were not "new source[s]" of pollutants within the meaning of 40 C.F.R. §§ 122.2 and 122.29(b). (OB at 19-24.) The Tribe is mistaken.

The New Source Analysis that ADEQ performed on remand and submitted to the Board (IOR 466 at 12-27) began with the following background ***21** information. The regulations that the EPA has promulgated under the Clean Water Act ("CWA") at 40 C.F.R. Subchapter N regulate the discharge of pollutants to surface waters from point source dischargers. (*Id.* at 17.) They subject existing pollution sources to best available technology ("BAT") and best conventional technology ("BCT") requirements, while subjecting new pollution sources to new source performance standards ("NSPS") that are generally more stringent. (*Id.*)

The regulations include the following definitions that distinguish existing sources from new sources. (*Id.* at 18.) A "source" is "any building, structure, facility, or installation from which there is or may be a discharge of pollutants." 40 C.F.R. § 122.29(a)(2). A "new source" is defined as follows in 40 C.F.R. § 122.2:
[A]ny building, structure, facility, or installation from which there is or may be a "discharge of pollutants," the construction of which commenced:

(a) After promulgation of standards of performance under section 306 of CWA which are applicable to such source, or

(b) After proposal of standards of performance in accordance with section 306 of CWA which are applicable to such source, but only if the standards are promulgated in accordance with section 306 within 120 days of their proposal.

The standards of performance promulgated under section 306 of the CWA (33 U.S.C. § 1316) appear in 40 C.F.R. Subchapter N.

***22** An "existing source" is any source that "is not a new source or a new discharger." 40 C.F.R. § 122.29(a)(3). A "new discharger" is defined as follows in 40 C.F.R. § 122.2:
[A]ny building, structure, facility, or installation:

(a) From which there is or may be a "discharge of pollutants;"

(b) That did not commence the "discharge of pollutants" at a particular "site" prior to August 13, 1979;

(c) Which is not a "new source;" and

(d) Which has never received a finally effective NPDES permit for discharges at that "site."

Since Congress enacted the CWA in 1972, the EPA has promulgated effluent limitation guidelines for over fifty-six major industrial categories and over 450 subcategories. (IOR 466 at 17.) The effluent limitation guidelines for copper mines appear in the Ore Mining and Dressing major industrial category, 40 C.F.R. Part 440, with a Copper, Lead, Zinc, Gold, Silver, and Molybdenum Ores Subcategory at Subpart J, 40 C.F.R. §§ 440.100 to 440.105 ("Subpart J"). (IOR 466 at 18.) The EPA initially promulgated existing source effluent limitation guidelines for copper mines under the Base and Precious Metals Subcategory in 1978. 43 Fed. Reg. 29771-02 (July 11, 1978). It reorganized and renamed some categories and added BAT and NSPS requirements in 1982. 47 Fed. Reg. 54598-01, 54602 (Dec. 3, 1982). It has not promulgated any additional NSPS since then ***23** in Subpart J, so for purposes of the "new source" definition in 40 C.F.R. § 122.2 and the "existing source" definition in 40 C.F.R. § 122.29(a)(3), December 1982 is the threshold date with respect to copper mines. (IOR 466 at 18.) If a source to which the NSPS that the EPA promulgated in 1982 applied was constructed after 1982, those standards would be the applicable

effluent limitation guidelines. (*Id.*) But if a source to which the NSPS that the EPA promulgated in 1982 applied was constructed before December 1982, the applicable effluent limitation guidelines would be those for existing sources. (*Id.*)

The NSPS for copper mine discharges in Subpart J apply to the following discharges:
(1) Mines that produce copper, lead, zinc, gold, silver, or molybdenum bearing ores, or any combination of these ores from open-pit or underground operations other than placer deposits;

(2) Mills that use the froth-flotation process alone or in conjunction with other processes, for the beneficiation of copper, lead, zinc, gold, silver, or molybdenum ores, or any combination of these ores;

(3) Mines and mills that use dump, heap, in-situ leach, or vat-leach processes to extract copper from ores or ore waste materials; and

(4) Mills that use the cyanidation process to extract gold or silver.

40 C.F.R. § 440.100(a).

The regulations define a "mine" as follows:
[A]n active mining area, including all land and property placed under, or above the surface of such land, used in or resulting from the work of extracting metal ore or minerals from their natural deposits ***24** by any means or method, including secondary recovery of metal ore from refuse or other storage piles, wastes, or rock dumps and mill tailings derived from the mining, cleaning, or concentration of metal ores.

40 C.F.R. § 440.132(g). Thus, a mine is an area in which active mining is taking place, and it includes all the land and property in that area that is used in or that results from "the work of extracting metal ore or minerals from their natural deposits by any means or method." (*Id.*)

The ADEQ determined that neither Shaft 10 nor any of the other new features at the Mine were "new source[s]" within the meaning of 40 C.F.R. § 122.2 and explained its determination as follows. (IOR 466 at 19-20.) Under 40 C.F.R. § 440.100(a), the NSPS that the EPA promulgated in Subpart J apply to mines and mills. There is no mill at the Mine. (IOR 466 at 20.) Since there are no NSPS that apply to any of the Mine's subparts, the question to be answered in determining whether the Mine was a "new source" under 40 C.F.R. § 122.2 was whether the Mine was constructed before or after the EPA promulgated the NSPS in 1982. (IOR 466 at 20 & n.2.)

The ADEQ noted the following. The Mine had originally begun operations in the early 1900s as the Magma Mine. (*Id.*) That mine had always been an underground mine in which shafts were drilled to extract ore from new bodies. (*Id.*) When Resolution Copper acquired the Mine, it created Shaft 10 and added other new features within the mining area after December 1982. (*Id.* at ***25** 20.) The ADEQ determined that neither Shaft 10 nor the other new features were new mines. It explained that if the EPA had promulgated NSPS that specifically applied to mine shafts or to any of the Mine's other new features in 1982, any of the features to which those standards applied would have been new sources under § 122.2. (IOR 466 at 20 & n.2.) The same would have been true if Resolution Copper had constructed a mill at the Mine. (*Id.* n.2) But "[b]ecause there [were] no source performance standards for features of a mine other than those applicable to a whole mine," ADEQ concluded that "the features added to the [Mine were] not new sources as defined in 40 C.F.R. § 122.2." (IOR 466 at 20.)

C. The ADEQ's New Source Analysis Under 40 C.F.R. § 122.29(b).

The ADEQ then explained the new source analysis that it had conducted under 40 C.F.R. § 122.29(b) as the Board had instructed it to do on remand. (IOR 466 at 20-25.) That provision establishes the following criteria for making a new source determination: (1) Except as otherwise provided in an applicable new source performance standard, a source is a "new source" if it meets the definition of "new source" in § 122.2, and

(i) It is constructed at a site at which no other source is located; or

(ii) It totally replaces the process or production equipment that causes the discharge of pollutants at an existing source; or

(iii) Its processes are substantially independent of an existing source at the same site. In determining whether these processes are
***26** substantially independent, the Director shall consider such factors as the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source.

(2) A source meeting the requirements of paragraphs (b)(1) (i), (ii), or (iii) of this section is a new source only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger. See § 122.2.

(3) Construction on a site at which an existing source is located results in a modification subject to § 122.62 rather than a new source (or a new discharger) if the construction does not create a new building, structure, facility, or installation meeting the criteria of paragraph (b)(1) (ii) or (iii) of this section but otherwise alters, replaces, or adds to existing process or production equipment.

(4) Construction of a new source as defined under § 122.2 has commenced if the owner or operator has:

(i) Begun, or caused to begin as part of a continuous on-site construction program:

(A) Any placement, assembly, or installation of facilities or equipment; or

(B) Significant site preparation work including clearing, excavation or removal of existing buildings, structures, or facilities which is necessary for the placement, assembly, or installation of new source facilities or equipment; or

(ii) Entered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with a reasonable time. Options to purchase or contracts which can be terminated or modified without substantial loss, and contracts for feasibility engineering, and design studies do not constitute a contractual obligation under the paragraph.

***27** In conducting the analysis under § 122.29(b), ADEQ relied on EPA statements concerning how the provision was to be applied. (IOR 466 at 20.) The EPA explained that the distinction between new and existing sources "is based on the concept that new facilities have the opportunity to install the best and most efficient production processes and wastewater treatment technologies." 49 FR 37998-01, 38043 (Sept. 26, 1984). It also explained that the provision incorporates a substantial independence test to determine "whether construction at the site of an existing source, which does not involve total replacement of process or production equipment, would result in a new source." *Id.* at 38045. This test is "aimed at ascertaining whether an existing source which undertakes major construction that legitimately provides it with the opportunity to install the best and most efficient production processes and wastewater treatment technologies should be required to meet new source performance standards at that facility." *Id.* at 38043. The EPA clarified the test by adding two new factors to § 122.29(b) to be considered in determining "whether construction at an existing facility results in processes that are substantially independent and therefore qualify as a new source: (1) The extent to which the new facility is integrated with the existing plant; and (2) the extent to which the new facility is engaged in the same general type of activity as the existing source." *Id.* at 38045; *see also* 40 C.F.R. § 122.29(b) (1)(iii) (incorporating the two factors).

***28** Under 40 C.F.R. § 122.29(b)(1), except as provided in an applicable NSPS, a source is a new source if it meets 40 C.F.R. § 122.2's definition of a "new source" *andone* of the factors that § 122.29(b)(1)(i)-(iii) establish. The ADEQ explained that because it had determined that the Mine's new features did not meet § 122.2's definition of a "new source," it believed that there was no need to consider the other factors. (IOR 466 at 21.) It nevertheless analyzed the new features under all of § 122.29(b)'s provisions to ensure that there was no confusion. (*Id.*)

A source is a new source under § 122.29(b)(1)(i) if it is constructed at a site at which no other source is located. The ADEQ noted that § 122.2 defines a "site" as "the land or water area where any 'facility or activity' is physically located or conducted, including adjacent land used in connection with the facility or activity." It concluded that this definition encompassed not only the preexisting mine, but also any adjacent land upon or under which mining activity would take place. It therefore determined that the Mine's new features were not constructed at a site at which no other source was located. (IOR 466 at 21.)

Under § 122.29(b)(1)(ii), a source is a new source if "[i]t totally replaces the process or production equipment that causes the discharge of pollutants at an existing source." The ADEQ noted that a "mine" is an active mining area where ore is extracted using any means or methods. (IOR 466 at 21; *see also* ***29** 40 C.F.R. § 440.132(a), (g).) It further noted that the Mine was "an underground mine where the extraction of ore involves drilling shafts to access, extract and bring ore to the surface for processing and concentrating" and that this process had not changed since the Magma Mine had begun its operations. (IOR 466 at 21.) It therefore concluded that the Mine's new features were not totally replacing that process.

With respect to production equipment, ADEQ noted the following. The permitted discharge at the Mine that was subject to an effluent limitation guideline was mine drainage, which 40 C.F.R. § 440.141(a)(10) defines as "any water drained, pumped or siphoned from a mine." (IOR 446 at 21-22.) Dewatering operations occur at underground mines to get access to the ore, and the dewatering production equipment at the Mine consists of pumps, pipes, and conveyances. (*Id.* at 22.) The Mine's drainage is conveyed from Shaft 10 to the "Never Sweat Tunnel," which had been constructed in the early 1970s to connect the mine's east plant to its west plant and to convey mine drainage. (*Id.*) The Mine's new features would still use the tunnel to convey mine drainage. (*Id.*) The Mine had increased drainage pumping and capacity by adding and deepening Shaft 10. (*Id.*) But since there were no performance standards that specifically applied to pumps, tunnels, or shafts, ADEQ concluded that there was no production equipment to "totally replace" within this subsection's meaning. (*Id.*)

***30** A source is a new source under § 122.29(b)(1)(iii) if its processes are substantially independent of those of an existing source at the same site. It provides that the factors to consider in determining whether this is the case include "the extent to which the new facility is integrated with the existing plant; and the extent to which the new facility is engaged in the same general type of activity as the existing source." The ADEQ concluded as follows. The Mine was the existing source at the site and the new features such as Shaft 10, the cooling tower, and the wash bays were all included within the same site or mine area. (IOR 466 at 22.) The new features were "fully integrated into the existing site, with mine drainage being conveyed through the Never Sweat Tunnel from the east plant to the west plant." (*Id.* at 23.) Because the new features were supporting the same process of extracting ore by any means or methods that had always existed at the site, there were no processes that were substantially independent of the existing process. (*Id.*)

Under § 122.29(b)(2), a source that meets the requirements of one of the factors that § 122.29(b)(1)(i)-(iii) establish is a new source "only if a new source performance standard is independently applicable to it. If there is no such independently applicable standard, the source is a new discharger." The ADEQ essentially concluded the following. The Mine's new features did not meet any of the requirements that § 122.29(b)(1)(i)-(iii) establish. (IOR 466 at 23.) Even if they had met any of those requirements, they still could not be considered new ***31** sources under § 122.29(b)(2) because there were no NSPS that were independently applicable to them. (*See id.*) The EPA had promulgated the NSPS in 40 C.F.R. § 440, Subpart J that applied to copper mine discharges in 1982. The only source at the site in question to which those standards applied-the mine as a whole-had existed at the site as the Magma Mine before 1982. (IOR 446 at 23.) Consequently, the Mine's new features were not new sources under § 122.29(b)(2). The Mine was not a new discharger either because 40 C.F.R. § 122.2 in part defines a new discharger

as one that "has never received a finally effective NPDES permit for discharges at that 'site,'" and it was undisputed that the Mine had been continuously permitted since permits were required (IOR 215; *see also* IOR 602 at 2). (*See* IOR 466 at 23.) In addition, the permit challengers had stated that they were not contending that the Mine was a new discharger (*see* IOR 440 at 5). (IOR 466 at 23 n.3.)

Under 40 C.F.R. § 122.29(a)(3), an "existing source" is any source that "is not a new source or a new discharger." Under § 122.29(b)(3), construction on a site at which an existing source is located results in a modification subject to 40 C.F.R. § 122.62 rather than in a new source or a new discharger "if the construction does not create a new building, structure, facility, or installation meeting the criteria of [§ 122.29(b)(1)(ii) or (iii)] but otherwise alters, replaces, or adds to existing process or production equipment." The ADEQ concluded as ***32** follows. The construction at the Mine did not create any new building, structure, facility, or installation that met the criteria of § 122.29(b)(1)(ii) or (iii) because there were no NSPS that were independently applicable to the Mine's new features. (IOR 466 at 23.) Resolution Copper had acted in accordance with the duty to reapply that 40 C.F.R. § 122.41 establishes and had submitted a renewal application. (IOR 466 at 23.) The ADEQ had updated the permit and the factsheet to incorporate the updated site information that the renewal application contained. (*Id.* at 23-24.) The ADEQ therefore "considered this permit modified to reflect the most current site conditions that have either altered, replaced, or added to the existing process." (*Id.* at 24.)

Under § 122.29(b)(4)(i)(A) and (B), construction of a new source "has commenced if the owner or operator has [b]egun or has caused to begin as part of a continuous on-site construction program [a]ny placement, assembly or installation of facilities or equipment or [s]ignificant site preparation work." Under § 122.29(b)(4)(ii), it has commenced if the owner or operator has "[e]ntered into a binding contractual obligation for the purchase of facilities or equipment which are intended to be used in its operation with[in] a reasonable time." These definitions of when construction has commenced apply to 40 C.F.R. § 122.2's definition of a "new source" as "any building, structure, facility, or installation from which there is or may be a 'discharge of pollutants,' the construction of which commenced" ***33** after "promulgation of standards of performance under section 306 of CWA which are applicable to such source." The ADEQ concluded that the construction date applicable to the NSPS standards that applied to the source being permitted, which was the existing mine, was December 1982 and that based on § 122.29(b)(4)'s definition of construction, the construction of the mine had begun before December 1982. (IOR 466 at 24.)

The ADEQ summarized its § 122.29(b) analysis as follows. A mine is defined (under 40 C.F.R. § 440.132(g)) as an "area," that "includes all land and property where the work of extracting ore is done by any means or method." (IOR 466 at 24.) "A mine is constantly expanding to extract new ore." (*Id.*) The ADEQ considered the new features that had recently been constructed at the Mine as "being both fully integrated with existing process and fully engaged in the same general type of activity." (*Id.; see also* § 122.29(b)(1)(iii).) The new features also had no NSPS that independently applied to them. (IOR 466 at 24; *see also* § 122.29(b)(2).) The ADEQ also concluded that the new features were not new features under the CWA because they were "constructed at a site where existing sources [were] located" (*see* § 122.29(b)(1)(i)), they "[did] not totally replace the process or production equipment at the site" (*see* § 122.29(b)(1)(ii)), and they were not "substantially independent of an existing source at the site" (*see* § 122.29(b)(1)(iii)). (IOR 466 at 24-25.) The ADEQ attached a flow chart to its ***34** New Source Analysis depicting the steps in that analysis. (*Id.* at 26-27.) Because the ADEQ's determination that the Mine's new features were not new sources was consistent with its decision to issue the Mine a permit in January 2017, no changes or modifications to the permit were necessary. (*Id.* at 25.)

D. The Superior Court Correctly Affirmed the Board's Decision Upholding ADEQ's Determination that the Mine's New Features Were Not New Sources Under 40 C.F.R. §§ 122.2 and 122.29(b).

In affirming the Board's decision upholding ADEQ's determination that the Mine's new features were not new sources, the superior court initially focused on 40 C.F.R. § 122.2's provision requiring that a new source be one with respect to which construction began after NSPS that were applicable to the source had been promulgated. (IOR 602 at 6.) It reasoned as follows. The parties agreed that the NSPS in question were codified at 40 C.F.R., Part 440, Subpart J and had become effective on December 3, 1982. (*Id.*) The applicable Subpart J effluent limitations at 40 C.F.R. § 440.100 operate on mines, mills, or both.

(IOR 602 at 8.) The definition of a "mine" in 40 C.F.R. § 440.132(g) is extremely broad and includes all of the equipment that is involved in extracting and working with the ore. (IOR 602 at 8.) The effluent limitation that specifically applies to copper mines applies to "mine drainage from mines," 40 C.F.R. § 440.104, and "mine drainage" means "any water drained, pumped, or siphoned from a mine," § 440.132(h). (IOR 602 at 8.) The court therefore concluded that "Subpart J operates on the mine as a whole ***35** and the effluent discharges from it and not [on] any particular construct associated with the mine." (*Id.*)

The court also cited 40 C.F.R. § 122.29(b)(2), which provides that a source that meets the requirements of § 122.29(b)(1)(i), (ii), or (iii) is a new source "only if a new source performance standard is independently applicable to it." (IOR 602 at 7.) The court concluded based in part on this language that unless there is an NSPS that independently applies to a source, the source cannot be a new source within the meaning of the governing regulations. (*Id.* at 6.) It found further support for this interpretation in *Mahelona v. Hawaiian Electric Co.*, 418 F. Supp. 1328 (D. Haw. 1976). (IOR 602 at 8-9.) The electric company in that case sought and obtained a permit to build a facility to discharge into the ocean the water that it used to cool its steam electric generating plants, which was classified as a pollutant. 418 F. Supp. at 1331. Permit challengers contended that the EPA had erred in failing to prepare an environmental impact statement, which it would have been required to prepare only if the discharge facility was a "new source" within the meaning of the applicable statute. (*Id.* at 1334-35.) Although the court acknowledged that the discharge facility came within the literal statutory definition of a new source, it concluded that it could not be a new source under the governing statutory framework. (*Id.* at 1335.) It based this conclusion in part on the fact that while there were performance standards that applied to steam electric generating ***36** plants, there were no performance standards that applied solely to discharge facilities. (*Id.*) The superior court concluded that just as steam electric generating plants were the operative units for the new source analysis in that case, the Mine as a whole was the operative unit for the new source analysis in this case. (IOR 602 at 9.) It therefore affirmed the Board's determination that no new source within the meaning of the applicable regulations had been established in this case. (*Id.*)

The Tribe contends that the Board's determination was erroneous because discrete pollutant-generating structures and facilities can themselves be new sources. (OB at 23.) It makes no argument supported by record cites and legal authorities with respect to this assertion as Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(a)(7)(A) requires. It has therefore waived the assertion and cannot supply the missing record cites and legal authorities in its reply brief. *See, e.g., In re Aubuchon*, 233 Ariz. 62, 64-65, ¶ 6 (2013) (stating that arguments not supported by adequate explanation, citations to the record, or authority are waived); *Nelson v. Rice*, 198 Ariz. 563, 567 n.3, ¶ 11 (App. 2000) (stating that arguments waived in an opening brief cannot be raised in a reply brief); *Valley Vendors Corp. v. City of Phoenix*, 126 Ariz. 491, 494 (App. 1980) (stating that assertions unsupported by argument or legal authority are deemed abandoned).

If the Court does not consider the assertion waived, it should nevertheless reject it because ADEQ's analysis established that the Mine's new features were ***37** not new sources under § 122.2 because no NSPS applied to them. (IOR 466 at 19-20.) It also established that they were not new sources under § 122.29(b)(1) because they were not new sources under § 122.2 and they did not satisfy any of the requirements that § 122.29(b)(1)(i)-(iii) establish. (IOR 466 at 21-22.) It further established that they could not be new sources under § 122.29(b)(2) even if they did satisfy any of the requirements that § 122.29(b)(1)(i)-(iii) establish because that provision specifically provides that in addition to satisfying one of those requirements, a source must also have "a new source performance standard that is independently applicable to it." (*See* IOR 466 at 23.) The Tribe's Opening Brief has not identified any NSPS that independently applies to any of the Mine's new features.

The Tribe also asserts that ADEQ erroneously conflated the Magma Mine with the current Mine. (OB at 23-24.) Although it contends that "[t]he record shows that these two mines are distinctly separate from each other, each having different ore deposits, different methods of extraction and each located on separate sites," it does not provide a single record cite or a single legal authority to support these contentions. It has therefore waived this assertion as well under the previously cited authorities.

If this Court determines that the Tribe has not waived this argument, it should nevertheless reject it because ADEQ's analysis established that the new ***38** features did not totally replace the process or production equipment that caused the discharge of pollutants at the existing source within the meaning of § 122.29(b)(1)(ii) (IOR 466 at 21-22) and that the new features' processes

were not substantially independent of those of an existing source at the same site within the meaning of § 122.29(b)(1)(iii) (IOR 466 at 23). Moreover, even if either or both of those requirements were satisfied, ADEQ also established that § 122.29(b)(2)'s additional requirement could not be satisfied because there were no NSPS that independently applied to any of the new features. (IOR 466 at 23.)

The Tribe asserts that ADEQ erred because Subpart J's NSPS independently apply to each of the new features at the site that generate mine drainage. (OB at 24.) The Tribe does not identify how any specific Subpart J provision allegedly applies to any specific new feature, so it has waived this assertion as well under the previously cited authorities.

If this Court determines that the Tribe has not waived this argument, it should nevertheless reject it. As previously noted, the superior court correctly rejected this argument because the Subpart J regulations apply to mines, the definition of a "mine" in 40 C.F.R. § 440.132(g) is extremely broad and includes all of the equipment that is involved in extracting and working with the ore, the effluent limitation that specifically applies to copper mines applies to "mine drainage from mines," 40 C.F.R. § 440.104, and "mine drainage" means "any ***39** water drained, pumped, or siphoned from a mine," § 440.132(h). (IOR 602 at 8.) The Tribe has not identified any NSPS that satisfies § 122.29(b)(2)'s requirement of *independently* applying to any of the Mine's new features as opposed to the Mine as a whole.

For the foregoing reasons, this Court should affirm the superior court's decision upholding the Board's determination that ADEQ established that the Mine's new features were not new sources under §§ 122.2 and 122.29(b).

IV. The Superior Court Properly Considered ADEQ's Interpretation of the New Source Regulations in Reviewing the Board's Final Decision, and the Board's Order Permitting ADEQ to Disregard the ALJ's Findings of Fact in Making Its New Source Analysis on Remand Did Not Render the Analysis Incomplete or Otherwise Deficient.

A. Standard of Review.

The standard of review that argument subsection III(A), *supra,* sets forth applies here as well.

B. The Superior Court Properly Considered ADEQ's Interpretation of the New Source Regulations in Reviewing the Board's Final Decision.

The Tribe contends that the superior court should have reviewed only the Board's final decision but that it instead erroneously conflated that review with a review of ADEQ's interpretations of the applicable statutes and regulations. (OB at 25.) The Tribe is mistaken.

***40** The superior court noted that when an ALJ recommends findings of fact and conclusions of law but an agency subsequently rejects or modifies those recommendations, the superior court's jurisdiction is limited to reviewing the final agency decision. (IOR 602 at 3.) The court therefore explicitly stated that its review in this case was limited to the Board's final decision. (*Id.*) The court noted, however, that A.A.C. R2-17-125(D) (now A.A.C. R2-17-124(D)) permits the Board to incorporate an ALJ's recommended findings of fact and conclusions of law into its decision by reference and that when the Board does so, those recommended findings and conclusions become part of the Board's decision and are therefore subject to the court's review. (IOR 602 at 3 n.5.)

In the present case, ADEQ was defending its decision to renew the mine's permit based in part on its determination that the mine's new features were not new sources of pollutants within the meaning of the governing regulations. The parties opposing the permit renewal, including the Tribe, argued that ADEQ had misconstrued those regulations and that the new features were new sources under them. Therefore, both the ALJ and the Board had to determine whether ADEQ had correctly interpreted the new source regulations. The ALJ's Findings of Fact numbered 99 through 117 reported the positions concerning the new source issue that ADEQ had taken at the administrative hearing. (*See* IOR 441 at 25-33.) The Board's final decision adopted the

ALJ's findings of fact concerning the new *41 source issue, including those that set forth ADEQ's positions on the issue. (*Id.* at 2.) It also accepted the New Source Analysis that ADEQ had conducted under 40 C.F.R. § 122.29(b) on remand, which also explained ADEQ's interpretations of the governing regulations. (IOR 466 at 12-27.) The Board accepted ADEQ's New Source Analysis and affirmed its issuance of the permit. (IOR 467 at 98.)

The Tribe maintains that the superior court should have focused solely on the Board's interpretations of legal questions. (OB at 26.) But because the Board's final decision determined that ADEQ had correctly interpreted the new source regulations, the superior court's review of the Board's decision necessarily required the court to decide whether ADEQ's interpretations were in fact correct. Contrary to the Tribe's assertions, this does not mean that the court was not properly limiting its review to the Board's final decision. It was properly doing so because the correctness of ADEQ's interpretations was a legal issue that the Board had decided. *See Carondelet Health Servs. v. Ariz. Health Care Cost Containment Sys. Admin.*, 182 Ariz. 502, 504 (App. 1995) (noting that in reviewing an administrative decision, a reviewing court draws its own conclusions as to whether the administrative agency erred in interpreting and applying the law).

In reviewing ADEQ's interpretations of the new source regulations, the superior court recognized that A.R.S. § 12-910(E) precluded it from deferring to those interpretations. (IOR 602 at 5.) It instead considered both ADEQ's and the *42 permit challengers' interpretations as well as the record and explained at length why it had independently determined that the Board had correctly adopted ADEQ's interpretation. (*Id.* at 6-9.)

For the foregoing reasons, the superior court properly reviewed the Board's final decision, including the Board's determination that ADEQ had correctly interpreted the new source regulations.

C. The Board's Order Permitting ADEQ to Disregard the ALJ's Findings of Fact in Making Its New Source Analysis on Remand Did Not Render the Analysis Incomplete or Otherwise Deficient.

The Tribe argues that because the Board permitted ADEQ to disregard the ALJ's findings of fact concerning the new source issue in conducting its new source analysis on remand, the superior court's consideration of ADEQ's analysis "was incomplete at best, if not wholly adulterated by [the Board's] manipulation of the evidentiary record." (OB at 26.) It maintains that ADEQ's analysis did not consider the facts that the Board later reinstated in its final decision (*id.*) and that the Board's "disconcerting" "manipulation of the facts in this case" may have tainted the superior court's review of ADEQ's new source analysis and of the Board's final decision (*id.* at 27). In making these assertions, the Tribe does not identify a single fact that it believes ADEQ failed to consider on remand that allegedly rendered its new source analysis incomplete or otherwise deficient. (*See* *43 *id.* at 25-27.) The Tribe similarly fails to offer any support for its repeated claims that the Board "manipulated" the facts or record in this case.

An examination of the findings of fact ("FOF") in question belies the Tribe's claims. The ALJ made twenty-three findings of fact concerning the new source issue. (IOR 441 at 15-24.) One finding recounted the permit challengers' position at the hearing that the new mine features were new sources. (*Id.* at 15-16 [FOF 98].) Eighteen findings recounted ADEQ's position at the hearing that the new features were not new sources and its explanations for its position. (*Id.* at 16-20 [FOF 99-108, 110-117].) One finding identified the undisputed fact that the mine's new features were constructed after certain performance standards were promulgated. (*Id.* at 19 [FOF 109].) Two findings quoted EPA comments and an EPA memorandum concerning the new source issue. (*Id.* at 20-24 [FOF 118-119].) Finally, the last finding described evidence that the Mine had introduced and ADEQ's representative's testimony concerning that evidence. (*Id.* at 24 [FOF 120].)

The Board adopted the ALJ's recommendation (IOR 465 at 90-93) that the matter be remanded to ADEQ so that it could conduct a new source analysis under 40 C.F.R. § 122.29(b). *Id.* The Board did not order ADEQ to disregard the findings of fact at issue on remand, it simply "permitted" it to do so. (*Id.* at 91.) Since eighteen of the findings of fact described the positions concerning the *44 new source issue that ADEQ had taken at the hearing before the ALJ, the Board's order allowed ADEQ to reconsider those positions in conducting the § 122.29(b) analysis and to make the necessary corrections if it determined that any of its previous positions had been wrong. This was in keeping with the principle that "the purpose of administrative review [is] to

permit the administrative body to correct errors at the administrative level." *David Murdock Dev. Co. v. Indus. Comm'n*, 129 Ariz. 492, 495 (App. 1981); *see also City of Tucson v. Mills*, 114 Ariz. 107, 110 (App. 1976) (noting that a decision [or an order] remanding a matter to an agency for further proceedings allows the agency to "take a fresh look at the matter involved").

More importantly, being given permission to *disregard findings of fact on* remand is not the same thing as being given permission to disregard *facts* on remand. The ALJ's findings of fact included historical facts such as when the former mine at the site had operated, when the applicable effluent guidelines and performance standards had been promulgated, and when the mine's new features had been constructed in relation to those guidelines and standards. (*See* IOR 440 at 16-18 [FOF 102-105]; at 18 [FOF 107]; at 19 [FOF 109].) The ADEQ's New Source Analysis demonstrates that ADEQ did not disregard any historical facts on remand because it includes all of those facts. (*See* IOR 466.) Moreover, ADEQ's position on the new source issue as reflected in its New Source Analysis was so ***45** consistent with its initial position that the Board was able to adopt all of the ALJ's findings of fact concerning the new source issue in its final decision. (IOR 467 at 96.) Given these circumstances and the Tribe's failure to identify a single fact that it believes ADEQ improperly disregarded on remand, the Tribe's contentions that giving ADEQ permission to disregard the ALJ's findings of fact while conducting its new source analysis on remand resulted in an analysis that was incomplete or otherwise deficient are meritless.

V. The Tribe Has Incorrectly Cited A.R.S. § 12-2030 in Support of Its Attorney's Fees Request Because that Statute Applies Only with Respect to a Duty Imposed by Law that Is So Clear that It Amounts to a Ministerial Duty.

The Tribe erroneously cites A.R.S. § 12-2030 in support of its attorney's fees request. "Section 12-2030 pertains to actions in mandamus, those seeking to compel an officer of the state or a political subdivision to perform some mandatory duty." *John C. Lincoln Hosp. & Health Corp. v. Maricopa County*, 208 Ariz. 532, 545, ¶ 45 (App. 2004). Section 12-2030 applies only when there is a "duty imposed by law" so clear that it amounts to a ministerial duty. *Id.* That is clearly not the case here.

CONCLUSION

For the foregoing reasons, the Court should affirm the superior court's judgment upholding the Board's decision.

***46** Respectfully submitted this 18th day of October, 2021.

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Footnotes

1 The ADEQ provides this statement pursuant to Arizona Rule of Civil Appellate Procedure ("ARCAP") 13(b) because it finds the Tribe's statements of the case, facts, and issues insufficient.

2 The original action was comprised of several appellants, including the Tribe. Resolution Copper intervened. IOR 28, 463 at 90. After the judicial review action in the superior court, only the Tribe elected to appeal to this Court.

3 Those Findings of Fact were numbers 98 through 120 inclusive. (IOR 440 at 15-24.)

4 Those Conclusions of Law were numbers 19 through 34 inclusive and number 68. (IOR 440 at 37-39, 44.)

5 Despite the parties' arguments about whether the Mine's new features were new sources under § 122.29(b), the ALJ stated in Conclusion of Law number 30 that "ADEQ did not conduct [the new source] analysis [and therefore] the tribunal has no authority to address that argument." (IOR 440 at 39.) This meant that the ALJ's only option was to recommend that the matter be remanded for ADEQ to conduct that analysis, and the Board accepted that recommendation.

6 The AzPDES permit program is embodied in A.R.S. Title 49, Chapter 2, Article 3.1 and is the state delegated program for regulating discharges to surface waters as provided in the federal Clean Water Act, 33 U.S.C. §§ 1311 to 1377. There are no meaningful differences between the federal and the state programs, and indeed, much of the federal statutory and regulatory requirements have been adopted into Arizona law by reference. Arizona Administrative Code ("A.A.C.") Title 18, Chapter 9, Article 9.

7 A.R.S. §§ 49-255 to -255.03.

8 A "point source" is a term of art that A.R.S. § 49-201(28) defines.

9 The Arizona AzPDES Permit contains no provisions that regulate mining methods, mining activities on public land, land swaps, surface land use, endangered species protections, wildlife regulations, or a myriad of other regulations authorized by state or federal agencies.

10 To give some scale concerning the ore body's size and location, it is located closer to the preexisting Magma Mine's underground workings than that preexisting mine was wide from West to East. (IOR 253 at 6, 11.) As is the case at most copper mines, the actual footprint of the mining activities at the Mine extends for several miles.

11 The "earn-in" period was the period during which Rio Tinto (Resolution Copper's predecessor) acquired a majority ownership stake in the Mine in 2004. *See* Testimony of Victoria Peacy, Senior Manager, Environmental Permitting and Approvals for Resolution Copper. (IOR 448 at 49, 74.)

12 Although the Mine is permitted to discharge water into Queen Creek, Resolution Copper pipes the treated mine drainage to a remote irrigation district. (IOR 442 at 121; IOR 446 at 27; IOR 448 at 50.) However, Resolution Copper sought the AzPDES Permit because it allows the Mine to discharge the water into Queen Creek if certain conditions exist or if the remote irrigation district becomes unavailable. (*See* IOR 276 at 121.)

13 The Mine's permit coverage has been continuously and timely renewed since it received this original permit. (IOR 215.)

14 The standard in 40 CFR § 122.4(i) prohibits only discharges that "cause or contribute to a violation of water quality standards," and it does not completely bar any discharge whatsoever.

15 An "active mining area" is defined in 40 C.F.R. § 440.132(a) as "a place where work *or other activity related to* the extraction [of ore] is being conducted." (Emphasis added.) "Other activity related to" mining is not limited to drilling, excavating, or processing ore, but is broad enough to encompass even applying for a regulatory permit necessary for mining operations to continue.

16 Although the San Manuel smelter is not on the Magma Mine site proper, the fact that Magma spent this money upgrading its ore processor is a sign of its intention to keep the Mine active for future ore extraction.

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